



UNITED STATES SENATE  
**REPUBLICAN  
POLICY COMMITTEE**

Larry E. Craig, Chairman  
Jade West, Staff Director

October 26, 2001

**The Anti-Terrorism Bill in Context**

## **Is Safety a Civil Right?**

British Air Marshall Sir John C. Slessor (1897-1979) famously said, “It is customary in democratic countries to deplore expenditures on armaments as conflicting with the requirements of the social services. There is a tendency to forget that the most important social service a government can do for its people is to keep them alive and free.”

Sir John’s remark comes to mind now because something equally pithy ought to be said about public safety and civil liberties. The collapse of the World Trade Center on thousands of our fellow citizens raises issues of civil liberties just as surely as the tapping of a telephone.

The Fourth Amendment to the Constitution reads in part, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .” Opponents of the anti-terrorism bill, whether in Congress or out, generally battled the bill because of their anxieties about the Fourth Amendment. Many Americans have forgotten that until fairly recently it was the President alone (or his attorney general) who applied the principles of the Fourth Amendment in foreign security cases. Perhaps we are more safe and more free now than we were in the 1970s before passage of the Foreign Intelligence Surveillance Act (FISA), but most of us do not remember the 1970s as the dark days of American fascism even though President Jimmy Carter was authorizing searches unilaterally.<sup>1</sup>

Every President since Franklin D. Roosevelt has “asserted the authority to authorize warrantless electronic surveillance and exercised that authority.”<sup>2</sup> Neither the courts nor the Congress played any

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<sup>1</sup> “In the Truong-Humphrey espionage case . . . President Carter personally authorized warrantless physical searches by the FBI. . . .” In the only cases directly addressing the legality of warrantless intelligence searches of foreign agents, the courts upheld the legality of the President’s order so long as the primary purpose of the investigation was foreign intelligence gathering, *United States v. Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), *United States v. Truong*, 629 F.2d 908 (4<sup>th</sup> Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982). S. Rept. No. 103-296, 103d Cong., 2d Sess. 33 (1994) [hereinafter, “1994 Intelligence Committee Report”].

<sup>2</sup> S. Rept. No. 95-604, pt. I, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 7 (1977). The 1977 report cited the work of the “Church Committee,” Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94<sup>th</sup> Cong., 2d Sess. S. Rept. No. 94-755, Book

significant role.

In 1978, in response to new revelations about Executive Branch abuses and to new interpretations by the Judicial Branch,<sup>3</sup> Congress passed and President Carter signed FISA which codified a procedure for obtaining judicial sanction for searches involving foreign agents.<sup>4</sup>

As recently as 1993, however, President Clinton's Attorney General, Janet Reno, authorized a warrantless search of the residence of Aldrich H. Ames, who was at the time an employee of the CIA.<sup>5</sup> That search discovered numerous items<sup>6</sup> that helped put Ames behind bars for life. Ames's treason dealt a hard blow to America and our intelligence services: it compromised numerous operations and sources and may have led to the deaths of 10 persons.<sup>7</sup>

Individual rights, judicially protected, are part of the genius of America. At the same time, the American people are neither fools nor ignoramuses nor weaklings — and, as has been famously remarked, our Constitution is not a suicide pact.<sup>8</sup> Congress understood all of the civil rights implications of the attacks of September 11, and it took the big picture into account when it passed the anti-terrorism bill, which the President signed today.

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<sup>3</sup> The leading cases from the Supreme Court were *Katz v. United States*, 389 U.S. 347 (1967), and *United States v. United States District Court*, 407 U.S. 297 (1972) (the “Keith case”) — neither of which challenged the President's unilateral authority in foreign intelligence cases. In *Katz*, the Court explicitly declined to extend its holding that the Fourth Amendment required a warrant in electronic surveillance cases to cases “involving the national security,” 389 U.S. at 358 n. 23. In the Keith case, the Court explicitly declined to extend its requirement for a warrant in internal security cases to cases involving “activities of foreign powers or their agents,” 407 U.S. at 321-22. These cases and others are summarized in the 1994 Intelligence Committee Report at 28-40, and in S. Rept. No. 95-604, part I, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 12-15 (1977).

<sup>4</sup> Pub. L. 95-511, Title I, Oct. 25, 1978, 92 Stat. 1783, 50 U.S.C. §1801 *et seq.*

<sup>5</sup> 1994 Intelligence Committee Report at 40.

<sup>6</sup> “On October 9, 1993, FBI agents conducted a search of Ames' residence in Arlington [Virginia]. Among other things, this search yielded (1) a typewriter ribbon which contained a note Ames had written to his KGB contact regarding a meeting in Caracas, Venezuela in October 1992; (2) a computer document which identified a mailbox at 37<sup>th</sup> and R Streets in Washington, D.C. as a signal site; and (3) a series of computer documents regarding Ames' relationship with the KGB. These computer documents included information on clandestine communications, classified CIA operations, classified CIA human assets, and information regarding the payments previously made to Ames.” “An Assessment of the Aldrich H. Ames Espionage Case and Its Implications for U.S. Intelligence,” Rept. of the Staff of the Senate Select Comm. on Intelligence, Sen. Print 103-90, 103d Cong. 2d Sess. 51 (1994) (citation to affidavit omitted).

<sup>7</sup> After the search of the Ames residence, FISA was amended to cover physical searches. Pub. L. 103-359, Title VIII, Oct. 14, 1994, 108 Stat. 3443, 50 U.S.C. §§1821-1828.

<sup>8</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (speaking of the Bill of Rights).

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